Filed 3/13/17 In re J.L. CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| In re J.L., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>J.L.,<br>Defendant and Appellant. | A148098<br><br>(Contra Costa County Super. Ct. No. J05-00105) |

Defendant J.L. appeals from the denial of his petition to recall his sentence pursuant to Proposition 47 and to reduce his conviction for unlawful driving or taking of a vehicle under Vehicle Code section 10851, subdivision (a), from a felony to a misdemeanor.[1] Defendant contends a Vehicle Code section 10851, subdivision (a), conviction can be a qualifying offense under Proposition 47 where, as here, the conviction was plainly for auto *theft* and the value of the stolen vehicle was less than $950. He further maintains that if it is not a qualifying offense, then exclusion of a section 10851, subdivision (a), theft conviction from Proposition 47's purview violates his equal protection rights. We reverse.

[1] "On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.)

***Background***

On January 16, 2005, defendant was driving a vehicle southbound on a one-way, northbound street.[2] An officer, spotting defendant, activated his lights and sirens and attempted a stop. Defendant turned into a nearby parking lot and attempted to leave the vehicle while it was still moving. He then backed into the pursuing patrol car, exited the car he was driving, fled to the rear of the parking lot, and attempted to hide under a pickup truck. He was arrested and taken to juvenile hall.

The Contra Costa District Attorney filed a Welfare and Institutions Code section 602 petition alleging defendant committed felony unlawful driving or taking of a vehicle without the owner's permission (count 1—Veh. Code, § 10851, subd. (a)), resisting arrest (count 2—Pen. Code, § 148, subd. (a)(1)), second degree robbery (count 3—Pen. Code, §§ 211, 212.5, subd. (c)), and felony receiving stolen property (count 4—Pen. Code, § 496, subd. (a)). Pursuant to a negotiated disposition, a fifth count was added for felony grand theft (Pen. Code, § 487, subd. (c)), defendant pleaded no contest to counts 1, 4, and 5, and the court dismissed counts 2 and 3.

A supplemental petition filed in February 2006 alleged a count of felony receiving stolen property, which defendant subsequently admitted. A second supplemental petition filed in July 2006, alleged a count of second degree robbery, which the juvenile court subsequently sustained. After defendant was convicted and sentenced as an adult to two years in state prison on another case, he was committed to the Youth Authority on the juvenile case.

In March 2016, defendant filed a petition for designation of his felony convictions as misdemeanors. The prosecution did not dispute defendant's claim that the stolen vehicle had a value of less than $950, as the owner had valued the car at $400. The trial court granted the petition in part, but declined to reduce defendant's Vehicle Code section 10851, subdivision (a) conviction because "the elements of 10851 include an intent to

[2] Because this conviction resulted from a negotiated disposition, we draw the facts from the Probation Department Report.

permanently deprive, which is theft, or temporarily deprive, which is not theft [and] the Vehicle Code was never mentioned [in] Prop 47, and I don't believe it's covered."

***Proposition 47 Can Apply to Vehicle Code Section 10851, Subdivision (a), Theft Conviction***

Whether Proposition 47 applies to a Vehicle Code section 10851, subdivision (a), theft conviction is a question presently before our Supreme Court. We acknowledge a majority of courts to consider the question have concluded such a conviction is not a qualifying offense, regardless of the value of the stolen vehicle.[3] A number of judges, however, have concluded otherwise.[4]

Given the wealth of opinions that have already addressed the issue, we discuss only briefly why we conclude a Vehicle Code section 10851, subdivision (a), offense can qualify—if it is clear the conviction is for *theft* (not "joyriding") and the value of the stolen vehicle is $950 or less. (See generally *People v. Garza* (2005) 35 Cal.4th 866, 871, 881[holding conviction under Veh. Code, § 10851, subd. (a), is a "theft" offense for

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[3] *People v. Sauceda* (2016) 3 Cal.App.5th 635, review granted November 30, 2016, S237975; see *People v. Allison* (Jan. 25, 2017, No. H043417) [nonpub. opn.] 2017 WL 361103; *People v. Bullard* (Dec. 12, 2016, No. E065918) [nonpub. opn.] 2016 WL 7188682, review granted February 22, 2017, S239488; *People v. Cabello* (Dec. 9, 2016, No. D069958) [nonpub. opn.] 2016 WL 7176680, review granted February 15, 2017, S239485; *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041; *People v. Solis* (2016) 200 Cal.Rptr.3d 463, review granted June 8, 2016, S234150; *People v. Orozco* (May 25, 2016, No. D067313) [nonpub. opn.] 2016 WL 3094164, review granted August 10, 2016, S235603; *People v. Kirkland* (July 20, 2016, Nos. A145179, A145793) [nonpub. opn.] 2016 WL 3950684, review granted October 12, 2016, S236678; *People v. Preciado* (May 12, 2016, No. B265313) [nonpub. opn.] 2016 WL 2860599, review granted July 27, 2016, S235394; *People v. Page* (2015) 194 Cal.Rptr.3d 164, review granted January 27, 2016, S230793; *People v. Oranje* (July 29, 2015, No. A143737) [nonpub. opn.] 2015 WL 4572235.

[4] E.g., *People v. Ortiz* (2016) 196 Cal.Rptr.3d 894, review granted March 16, 2016, S232344 [section 10851 conviction qualifies where vehicle value is under $950]; *People v. Alcazar* (Sept. 7, 2016, No. B265582) [nonpub. opn.] 2016 WL 4660820; see *People v. Stulting* (June 21, 2016, No. E063670) [nonpub. opn.] 2016 WL 3547345 [concluding petitioner failed to carry burden and affirming, but without prejudice to filing another petition; two concurring opinions, one stating a Veh. Code, § 10851, subd. (a) conviction is not a qualifying offense, the other, that it can be].

purposes of barring simultaneous conviction for receiving stolen property where defendant had intent to permanently deprive owner of vehicle, but is not a "theft" offense barring second conviction where defendant had no such intent and Veh. Code, § 10851 conviction is for joyriding].)

Suffice it to say the intent of the proposition seems clear—to include, as a qualifying offense, "car theft" where the vehicle is worth $950 or less. The Legislative Analyst's analysis provided to voters stated: "***Grand Theft.*** Under current law, theft of property worth $950 or less is often charged as petty theft, which is a misdemeanor or an infraction. However, such crimes can sometimes be charged as grand theft, which is generally a wobbler. For example, a wobbler charge can occur if the crime involves the theft of certain property (such as cars) or if the offender has previously committed certain theft-related crimes. This measure would limit when theft of property of $950 or less can be charged as grand theft. Specifically, such crimes would no longer be charged as grand theft solely because of the type of property involved or because the defendant had previously committed certain theft-related crimes." (Cal. Voter Information Pamp., Gen. Elec. (Nov. 4, 2014) p. 35 at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf > [as of March 13, 2017].)

If that is the case, then we fail to see why it should make any difference to the outcome whether a *theft* of a low value vehicle was charged under Penal Code section 487, subdivision (d)(1) (Grand Theft Auto) or Vehicle Code section 10851, subdivision (a) (Theft or Unauthorized Use of Vehicle). Indeed, it appears Proposition 47 focuses on the value of the stolen item, not on the statutory choice the prosecutor made in charging this particular crime. Further, if Vehicle Code section 10851, subdivision (a), theft convictions are deemed not to be within the ambit of Proposition 47, that could render the measure's indisputable applicability to Penal Code section 487, subdivision (d)(1), essentially a moot point, as the theft of low value vehicles could always be charged as a wobbler under Vehicle Code section 10851, subdivision (a), contrary to the voters' apparent intent to include car thefts within the provisions of the proposition.

We completely agree with the observation by other courts that reasonable minds can differ on the answer to the issue presented here and that reconciling the apparent intent of the voters with the statutory language enacted by Proposition 47 is not a particularly easy task. On balance, we conclude it is reasonable to construe the language of Penal Code section 490.2, which was enacted as part of Proposition 47, as reaching Vehicle Code section 10851, subdivision (a), to the extent it defines a vehicle *theft* offense that could have been charged under Penal code section 487, subdivision (d)(1).[5]

Given our conclusion that a theft conviction under Vehicle Code section 10851, subdivision (a), can be a qualifying offense under Proposition 47, we need not, and do not, consider defendant's equal protection argument. Given that there is no dispute the value of the stolen vehicle was less than $950, we reverse and remand for further consideration of defendant's petition.

**DISPOSITION**

The trial court's order denying defendant's Proposition 47 petition is reversed, and the matter is remanded for further proceedings on the petition.

[5] Section 490.2, subdivision (a), provides in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." (Pen. Code, § 490.2, subd. (a).)

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Banke, J.

We concur:

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Humes, P.J.

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Margulies, J.